

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE  
August 5, 2002

In Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance  
(InterLATA) Service in Tennessee Pursuant to Section 271 of the  
Telecommunications Act of 1996*

Docket No. 97-00309

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ORDER RESOLVING PRE-HEARING MOTIONS

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This matter came before the Pre-Hearing Officer for the purpose of holding a Pre-Hearing Conference on July 30, 2002, at which time the Pre-Hearing Officer made certain procedural determinations and addressed: the Petitions to Intervene filed by Birch Telecom of the South, Inc. ("Birch") and Ernest Communications, Inc. ("Ernest"), the Motion to Compel filed by the Southeastern Communications Carriers Association ("SECCA"), AT&T Communications of the South Central States ("AT&T"), TCG MidSouth, Inc. ("TCG"), MCI WorldCom Communications, Inc., MCIMetro Access Services, Inc. and Brooks Fiber Communications of Tennessee, Inc. (collectively "WorldCom"), the Affidavit of R. Douglas Lackey for Permission to Practice *Pro Hac Vice* on behalf of BellSouth Telecommunications, Inc. and the Application for Permission to Appear *Pro Hac Vice* of Susan J. Berlin on behalf of WorldCom, Inc.

**Background**

On April 26, 2002 BellSouth submitted its third Section 271 filing to the Authority. The parties proceeded with discovery pursuant to a May 8, 2002 Notice setting forth a procedural schedule issued by Director Melvin Malone, serving as Pre-

Hearing Officer in the above-captioned proceeding.<sup>1</sup> On May 23, 2002, Pre-Hearing Officer Malone issued a Notice directing the parties to reserve August 5-9, 2002 for the Hearing in this matter. On June 6, 2002, BellSouth responded that it would be available for such a Hearing. AT&T, TCG and WorldCom filed a Response to the Proposed Hearing dates on June 6, 2002, seeking a suspension of the Hearing.

In June 26, 2002 correspondence, BellSouth notified the Authority that the parties had agreed to the following proposed stipulation:

The CLECs will not submit evidence contesting BellSouth's compliance with Section 271 Checklist Items 3, 7, 9, and 12. Nor will the CLECs submit evidence contesting BellSouth's compliance with Section 272 of the Federal Act.

On June 28, 2002, BellSouth, AT&T, TCG, WorldCom, and KMC Telecom III, Inc. and KMC Telecom V, Inc. (collectively "KMC") filed lists of proposed issues to be heard in this proceeding. On the same day, SECCA, AT&T, TCG and WorldCom filed the *Motion of CLECs to Compel Response by BellSouth Telecommunications, Inc. to the Consolidated CLEC First Data Requests*. BellSouth filed supplemental responses to Consolidated CLEC First Data Request Items No. 3, 7, 8, 44 and 60 on July 8, 2002 and to Data Request Item Nos. 15, 71, 72, 73 and 105 on July 9, 2002. Birch Telecom and Ernest filed Petitions to Intervene on July 9, 2002 and July 12, 2002, respectively.

At a regularly scheduled Authority Conference held on July 23, 2002, the panel of Directors presiding over this docket voted unanimously to appoint Director Deborah Taylor Tate to act as Pre-Hearing Officer to prepare the docket for a hearing. On July 24,

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<sup>1</sup> The terms of the former Directors of the Authority, Chairman Sara Kyle, and Directors H. Lynn Greer, Jr. and Melvin J. Malone, expired on June 30, 2002. Chairman Kyle was reappointed and commenced a new term as a Director of the Authority on July 1, 2002. Pursuant to the requirements of the amended provisions of Tenn. Code Ann. § 65-1-204, a three member voting panel consisting of Chairman Kyle and Directors Deborah Taylor Tate and Pat Miller was randomly selected and assigned to this docket.

2002 the Pre-Hearing Officer issued a *Notice of Pre-Hearing Conference* to be held on July 30, 2002. The Notice stated that the purpose of the Pre-Hearing was to:

- (1) Review and/or revise the procedural schedule;
- (2) Adopt an issues list;
- (3) Address the *Response of AT&T Communications of the South Central States, LLC, TCG MidSouth, Inc., MCI WorldCom Communications, Inc. MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. to the Proposed Hearing Dates*, filed June 6, 2002, seeking to suspend evaluation of BellSouth's § 271 until a complete § 271 filing is provided by BellSouth;
- (4) Address the *Motion of CLECs to Compel Response by BellSouth Telecommunications, Inc. to the Consolidated CLEC 1<sup>st</sup> Data Requests* filed on June 28, 2002;
- (5) Address any other outstanding motions such as motions to intervene; and
- (6) Make any other necessary preparations of the case in order to move the matter to a hearing.

On July 26, 2002, BellSouth filed the *Affidavit of R. Douglas Lackey for Permission to Appeal Pro Hac Vice*. WorldCom filed an *Application for Permission to Appear Pro Hac Vice* on behalf of Susan J. Berlin on August 1, 2002.

### **The July 30, 2002 Pre-Hearing Conference**

The parties in attendance at the July 30, 2002 Pre-Hearing Conference included:

BellSouth Telecommunications, Inc. ("BellSouth") – **Guy M. Hicks, Esq.**, 333 Commerce Street, 22<sup>nd</sup> Floor, Nashville, TN 37201-3300 and **Lisa Foshee, Esq.**, 675 West Peach Street, Suite 4300, Atlanta, GA 30375;

AT&T Communications of the South Central States, Inc. ("AT&T") – **Michael A. Hopkins, Esq.**, McKenna & Cuneo, L.L.P., 1900 K Street, Washington, D.C. 20006;

ACCESS Integrated Networks, Inc. ("ACCESS"), ITC DeltaCom, Inc. ("DeltaCom"), XO Tennessee, Inc. ("XO") and Dieca d/b/a COVAD Communications Co. (COVAD"), Birch, Ernest and Southeastern Competitive Carriers Association ("SECCA") – **Henry Walker, Esq.**, Boulton, Cummings, Connors & Berry, 414 Union Street, No. 1600, P.O. Box 198062, Nashville, TN 37219-8062;

KMC Telecom III, Inc. and KMC Telecom V, Inc. (collectively "KMC Telecom"), – **H. LaDon Baltimore, Esq.**, Farrar & Bates, LLP, 211 Seventh Ave. N., Suite 420, Nashville, TN 37219;

SBC Telecom, Inc. – **D. Billye Sanders, Esq.**, Waller Lansden, P.O. Box 198866, Nashville, TN 37219;

Office of the Attorney General and Reporter, Consumer Advocate and Protection Division ("CAD") – **Vance Broemel, Esq.**, John Sevier Building, 500 Charlotte Ave. Nashville, TN 37243.

The following individuals participated via telephone:

Access Integrated Networks, Inc., – **Mark Ozanick**, 4885 Riverside Drive, Suite 202, Macon, GA 31210;

MCIWorldCom – **Susan Berlin, Esq.**, 6 Concourse Parkway, Atlanta, GA 30328;

AT&T – **Cheryl Bursh, District Manager, Law and Government Affairs**, 1220 Peachtree St., N.E., Room 8056, Atlanta, GA 30309;

KMC Telecom – **Andrew Klein, Esq.**, Kelley, Drye & Warren, 1200 19<sup>th</sup> St. N.W., Washington, D.C., 20036.

### **Pending Motions**

The Pre-Hearing Officer addressed the Petitions to Intervene filed pursuant to Tenn. Code Ann. § 4-5-310 by Birch Telecom and Ernest. The Petitions assert that because Birch and Ernest are certified to offer intrastate telecommunication services in Tennessee, they have an interest in assuring BellSouth's compliance with 47 U.S.C. §271. No objections to the Petitions to Intervene have been filed.

Tenn. Code Ann. § 4-5-310(a) sets forth the following criteria for granting petitions for intervention:

(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

- (2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and
- (3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

Having read and considered the Petitions to Intervene filed by Birch and Ernest, the Pre-Hearing Officer found that said Petitions comply with the requirements of Tenn. Code Ann. § 4-5-310. The interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the interventions. Accordingly, pursuant to Tenn. Code Ann. § 4-5-310, the Petitions to Intervene filed by Birch and Ernest were granted.

After resolving the Motions to Intervene, the Pre-Hearing Officer addressed the *Motion of CLECs to Compel Response by BellSouth Telecommunications, Inc. to the Consolidated CLEC First Data Requests* filed by SECCA, AT&T, TCG and WorldCom. The Motion to Compel seeks full and complete responses to Data Request Item Nos. 7, 15, 44, 71, and 105, which were included in the *Consolidated CLEC First Data Request to BellSouth Telecommunications, Inc.* filed on May 23, 2002.

BellSouth filed its initial responses to the data requests on June 11, 2002. BellSouth then filed Supplemental Responses to Consolidated CLEC First Data Request Items No. 3, 7, 8, 44 and 60 on July 8, 2002 and to Data Request Item Nos. 15, 71, 72, 73 and 105 on July 9, 2002.

During the July 30<sup>th</sup> Pre-Hearing Conference, AT&T acknowledged that the Motion to Compel was moot, with the exception of BellSouth's response to the movants'

request related to the implementation of the Tennessee performance measurements.<sup>2</sup> BellSouth responded that it did not intend to supplement its response because the implementation of the Tennessee performance measurements had been stayed.

BellSouth's Motion for Stay in the *Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*, TRA Docket No. 01-00193 was granted in part at a regularly scheduled Authority Conference on July 23, 2002.<sup>3</sup> At that Authority Conference, a majority<sup>4</sup> of the panel also voted to grant BellSouth's *Motion for Reconsideration*, which sought review of the *Amended Final Order Granting Reconsideration and Clarification and Setting Performance Measurements, Benchmarks and Enforcement Mechanisms*, issued on June 28, 2002. The *Motion for Reconsideration* was granted as part of a two-step process that allows the Directors to grant motions for reconsideration in order to consider their substance at a later date.<sup>5</sup> At the Authority Conference, a majority of the Directors determined to deliberate the merits of the Motion at the regularly scheduled Authority Conference on August 5, 2002. The stay will remain in effect pending the resolution of the *Motion for Reconsideration*.

In light of the procedural posture of TRA Docket No. 01-00193, that portion of the Motion to Compel addressing the performance measurement issue was held in abeyance until the panel in TRA Docket No. 01-00193 determines the duration of the stay. Should the panel in TRA Docket No. 01-00193 lift the stay, the movants herein

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<sup>2</sup> See *Transcript of July 30, 2002 Pre-Hearing Conference*, p.10. Presumably, AT&T was referring to Data Request Item No. 15.

<sup>3</sup> The randomly selected voting panel in TRA Docket No. 01-00193 consists of Chairman Kyle and Directors and Pat Miller and Ron Jones.

<sup>4</sup> Chairman Kyle did not vote with the majority.

<sup>5</sup> See Tenn. Comp. R. & Reg. 1220-1-2-.20.

may raise this matter at the commencement of the Hearing in this docket on August 6, 2002. The portions of the Motion to Compel that do not address the performance measurement issue are dismissed as moot.

The Pre-Hearing Officer then turned to the request by AT&T, TCG and WorldCom that the Authority suspend its evaluation of BellSouth's Section 271 filing until: (1) BellSouth provides a complete Section 271 filing that includes a decision in Docket No. 01-00362<sup>6</sup> as to whether BellSouth provides nondiscriminatory access to its Operations Support System ("OSS"); (2) BellSouth implements the performance measurements adopted by the Authority in Docket No. 01-00193; and (3) BellSouth produces Tennessee-specific data in accordance with those performance measures. BellSouth responded to the AT&T and MCI filing on June 12, 2002, urging the Authority to deny the CLEC's request.

During the regularly scheduled Authority Conference on July 23, 2002, a majority of the panel in TRA Docket No. 01-00362 voted to grant the *Motion for Reconsideration* filed by BellSouth on July 8, 2002.<sup>7</sup> BellSouth's Motion sought reconsideration and reversal of the *Order Resolving Phase I Issues of Regionality* issued by the Authority on June 21, 2002. In addition to granting BellSouth's *Motion for Reconsideration*, the majority of the voting panel deemed BellSouth's OSS to be regional.

At the July 30<sup>th</sup> Pre-Hearing Conference, the Pre-Hearing Officer took judicial notice of the decision on regionality in TRA Docket No. 01-00362.<sup>8</sup> The Pre-Hearing

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<sup>6</sup> *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362.

<sup>7</sup> Director Jones did not vote with the majority. After stating that BellSouth's *Motion for Reconsideration* contains a multitude of issues that need to be addressed in detail, Director Jones moved to grant the Motion and set the matter for further proceedings at a subsequent conference to consider the merits of BellSouth's Motion. Director Jones' motion failed for lack of a second.

<sup>8</sup> See Transcript of July 23, 2002 Pre-Hearing Conference, p. 13.

Officer also informed the parties that Checklist Item No. 2, Nondiscriminatory access to network elements, would not be heard during the Hearing commencing on August 6<sup>th</sup>, but would be considered at a separate, subsequent hearing, allowing the parties the opportunity to file additional testimony if deemed necessary. The Pre-Hearing Officer subsequently determined that, in light of the Authority's finding on regionality, the Tennessee performance measurements, benchmarks and enforcement mechanisms adopted in Docket No. 01-00193 are not so inextricably tied to the Section 271 docket that the Hearing scheduled to commence on August 6<sup>th</sup> cannot proceed.<sup>9</sup> Accordingly, the request to suspend these proceedings was denied.

#### **Issues List**

During the Pre-Hearing Conference, the Pre-Hearing Officer distributed to all parties a list of issues that integrated all of the issues proposed previously by the parties. After considerable discussion, BellSouth, ACCESS, DeltaCom, XO, COVAD, Birch, Ernest SECCA, CAD, and KMC Telecom had no objections to the following list of "Track "A" issues, which focus on whether BellSouth has met the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996.<sup>10</sup>

#### **Stipulated Issues:**

Checklist Item No. 3 - Nondiscriminatory access to poles, ducts, conduit and rights-of-way

Checklist Item No. 7 - Nondiscriminatory access to 911 & E911 services, directory assistance and operator services

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<sup>9</sup> See Transcript of July 30, 2002 Pre-Hearing Conference, pp. 13-14.

<sup>10</sup> During the Pre-Hearing Conference, SBC Telecom declined to participate in the stipulations because it is merely monitoring these proceeding and does not intend to participate actively in this docket. On August 2, 2002, KMC Telecom notified the Authority that it too intended to monitor rather than participate in the proceedings.



Checklist Item No. 9 - Compliance with numbering administration guidelines, plans and rules

Checklist Item No. 12 - Nondiscriminatory access to services and information to provide for local dialing parity

**Non-stipulated Issues:**

**Checklist Item No.1 – Interconnection** - Has BellSouth provided interconnection in accordance with the requirements of Sections 251(c)(2) and 252(d)(1) of the Telecommunications Act of 1996 pursuant to 271(c)(2)(B)(i) and applicable rules promulgated by the FCC?

**Checklist Item No. 2 - Nondiscriminatory access to network elements** - Has BellSouth provided nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1) of the Telecommunications Act of 1996 pursuant to 271(c)(2)(B)(ii) and applicable rules promulgated by the FCC?

**Checklist Item No. 4 - Unbundled local loop transmission** - Has BellSouth unbundled local loop transmission between the central office and the customer's premises from local switching or other services, pursuant to Section 271(c)(2)(B)(iv) and applicable rules promulgated by the FCC?

**Checklist Item No. 5 - Unbundled local transport** - Has BellSouth unbundled the local transport on the trunk side of a wireline local exchange carrier switch from switching or other services, pursuant to Section 271(c)(2)(B)(v) and applicable rules promulgated by the FCC?

**Checklist Item No. 6 - Unbundled local switching** - Has BellSouth provided unbundled the local switching from transport, local loop transmission, or other services, pursuant to Section 271(c)(2)(B)(vi) and applicable rules promulgated by the FCC?

**Checklist Item No. 8 - Provision of white pages directory listings** - Has BellSouth provided white pages directory listings for customers of other telecommunications carrier's telephone exchange service, pursuant to Section 271(c)(2)(B)(viii) and applicable rules promulgated by the FCC?

**Checklist Item No. 10 - Nondiscriminatory access to databases and associated signaling** - Has BellSouth provided nondiscriminatory access to data bases and associated signaling necessary for call routing and completion, pursuant to Section 271(c)(2)(B)(x) and applicable rules promulgated by the FCC?

**Checklist Item No. 11 - Provision of number portability** - Has BellSouth provided number portability, pursuant to Section 271(c)(2)(B)(xi) and applicable rules promulgated by the FCC?

**Checklist Item No. 13 - Provision of reciprocal compensation arrangements** - Has BellSouth provided reciprocal compensation arrangements in accordance with the requirements of Section 252(d)(2) of the Telecommunications Act of 1996, pursuant to Section 271(c)(2)(B)(xiii) and applicable rules promulgated by the FCC?

**Checklist Item No. 14 – Resale** - Has BellSouth provided telecommunications services available for resale in accordance with the requirements of Sections 251(c)(4) and 252(d)(3) of the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

**Issue 15** - Is approval of BellSouth's entry into the interLATA market in Tennessee consistent with the public interest, convenience and necessity?

**Requests to Appear Pro Hac Vice**

On July 26, 2002 BellSouth filed the *Affidavit of R. Douglas Lackey for Permission to Practice Pro Hac Vice*. On August 1, 2002, an *Application for Permission to Appear Pro Hac Vice* was filed on behalf of Susan J. Berlin, attorney for WorldCom.

Mr. Lackey's Affidavit states that he is licensed and in good standing in the State of Georgia and that no disciplinary actions or investigations are pending against him.<sup>11</sup> Said Counsel agrees to subject himself to the jurisdiction of the TRA in any manner arising out of his conduct in such proceedings and agrees to be bound by the rules governing the conduct of attorneys appearing before the Authority.

Ms. Berlin's Application states that she is licensed and in good standing in the State of Texas and that no disciplinary actions or investigations are pending against her.<sup>12</sup> Said Counsel agrees to subject herself to the jurisdiction of the TRA in any manner arising out of her conduct in such proceedings and agrees to be bound by the rules governing the conduct of attorneys appearing before the Authority.

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<sup>11</sup> See Rule 19, Rules of the Tennessee Supreme Court.

<sup>12</sup> See *id.*

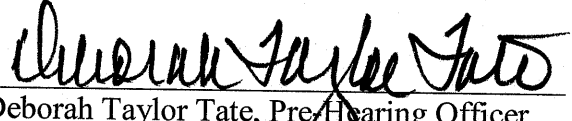
These requests for permission to practice comply with Rule 19, Rules of the Tennessee Supreme Court and Tenn. Comp. R. & Reg. 1220-1-2-.04(7). Accordingly, requests by R. Douglas Lackey and Susan J. Berlin for permission to practice before the Authority in the Hearing in this matter commencing on August 6, 2002 are granted.

**IT IS THEREFORE ORDERED THAT:**

1. The Petition to Intervene filed by Birch is granted. The interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.
2. The Petition to Intervene filed by Ernest is granted. The interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.
3. Those portions of the Motion to Compel filed by AT&T, TCG, SECCA WorldCom that do not address the Tennessee performance measurements are dismissed as moot. Those portions of the Motion to Compel that address the Tennessee performance measurements are held in abeyance pending resolution of the Motion for Reconsideration filed by BellSouth in TRA Docket No. 01-00193.
4. The request by AT&T, TCG and WorldCom that the Authority suspend its evaluation of BellSouth's Section 271 filing is denied.
5. Checklist Item No. 2, Nondiscriminatory access to network elements, shall not be heard during the Hearing commencing on August 6<sup>th</sup>, but will be considered at a separate, subsequent hearing.
6. The list of issues as set forth in this Order is hereby adopted.

7. The Affidavit for Permission to Practice filed by BellSouth Telecommunications, Inc. ("BellSouth") on behalf of R. Douglas Lackey is granted.

8. The Application for Permission to Practice filed by WorldCom on behalf of Susan J. Berlin is granted.

  
Deborah Taylor Tate, Pre-Hearing Officer